A **CHIONG WEE CHIOK**

v.

BARAU LAJA & ANOR

B HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 12-8-2007]
11 DECEMBER 2007

C ***CIVIL PROCEDURE:*** *Writ of summons - Striking out - Appeal against - Whether writ not properly issued, sealed and signed by registrar of subordinate courts - Rules of procedure - Subordinate Courts Rules 1980, O. 5 rr. 1, 6(3), O. 53 r. 6*

This was an appeal by the appellant/plaintiff against the decision of the
D Sessions Judge allowing the striking out application of the respondents/ defendants made on the grounds that the summons served on the defendants were not properly issued, sealed and signed by the registrar of the subordinate courts, as set out in O. 5 rr. 1 and 6(3) and O. 53 r. 6 of the Subordinate Courts Rules 1980. The appellant's cause of
E action arose in respect of a motor vehicle accident wherein the appellant suffered injuries. The respondents said that the service copy of the summons was not a sealed order signed by the registrar. There was no dispute in this case that the court's copy in the court's file was issued sealed and signed by the registrar. The respondent argued that the
F appellant's failure to serve a sealed and signed copy of the summons was in breach of many of the mandatory provisions of rules of procedure. The only issue requiring determination was whether the various provisions of the rules of procedure relied on by the respondents were mandatory.

G **Held (allowing the appeal):**

(1) The appellant had complied with the rules of procedure and the summons had been regularly issued, although the service copy was irregular because of the omission of the court registry and also the
H failure of the appellant to check the service copy before effecting service. The respondents had not been prejudiced and had appeared before the court without taking any objection. Even if objection had been taken, the court had discretion to condone the irregularity by ordering a fresh sealed copy to be served. In this case the appellant, realising the error, had caused a fresh served copy to be issued
I from the registry and served on the respondent. An action is commenced when a plaintiff files the writ at the registry and pays the requisite fees and not necessarily when the writ is sealed. In

the instant case, the appellant had complied with the rules of court and it was not a proper exercise of discretion to strike out the suit, when the omission was attributed to the court registry. In such circumstances, the litigant should not be blamed. *Jumatsah Daud v. Voon Kin Kuet* (foll); *TM Feroze Khan & Ors v. Merra Hussain TM Mohamed Mydin* (foll). (para 8)

Case(s) referred to:

Ahmad Tajuddin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Government of State of Pahang v. Tengku Abdul Aziz & Anor [1977] 1 LNS 30 FC ***(refd)***

Harkness v. Bells Asbestos & Engineering Ltd [1967] 2 QB 729 ***(refd)***

Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd [2002] 8 CLJ 497 HC ***(refd)***

Jumatsah Daud v. Voon Kin Kuet & Anor [1980] 1 LNS 176 HC ***(foll)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor [1994] 1 LNS 212 HC ***(refd)***

Malayan Banking Berhad v. Lim Tee Yong & Ors [1994] 4 CLJ 558 HC ***(refd)***

Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Berhad [2002] 1 CLJ 645 FC ***(refd)***

Perbadanan National Insurans Sdn Bhd v. Pu Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin [1999] 4 CLJ 373 FC ***(foll)***

Union of India v. Hindustan Development Corp AIR [1994] SC 988 ***(refd)***

Yu Oi Yong & Anor v. Ho Toong Peng [1976] 1 LNS 174 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 2, O. 32 r. 13(2)
Subordinate Court Rules 1980, O. 2, O. 5 rr. 1, 6(3), O. 53 r. 6

For the appellant - Henry Ling; M/s Ling & Wong Advocates
For the respondent - Esther Wong; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of appellant/plaintiff's appeal against the decision of the learned sessions judge who allowed the striking out application of the respondent/defendant made on the grounds that the summons served on the defendants were not properly issued, sealed, and signed by the Registrar of the Subordinate Courts, as set out in O. 5 rr. 1 and 6(3) and O. 53 r. 6 of the SCR 1980.

A **Brief Facts**

[2] The appellant's cause of action arose in respect of a motor vehicle accident wherein the appellant suffered injuries. The respondent says the service copy of the summons was not a sealed order signed by the registrar. There is no dispute in this case that the courts copy in the court's file was issued sealed and signed by the registrar. The respondent argues that the failure of the appellant to serve a sealed and signed copy of the summons is in breach of many of the mandatory provisions of rules of procedure in particular:

(i) Order 5 r. 1 SCR 1980 which states:

> Every summons must be in Form 1

(ii) Order 5 r. 6(3) SCR 1980 which states:

> The Registrar shall assign a serial number to the summons and shall sign, seal and date the summons whereupon the summons shall be deemed to be issued.

(ii) Order 53 r. 6 SCR 1980 which states:

> Every document issued by the Registry for which a Form marked with the word "seal" is prescribed in Schedule A must bear the seal of the Court.

[3] The only issue for me to decide is whether various provisions of the rules of procedure relied on by the respondents is mandatory. The law in this area is well settled. A rule of procedure is only mandatory when the law in positive terms say that or can be implied as a condition precedent in the cause of proceedings, otherwise any omission to comply with the rules may be condoned by the courts pursuant to various provisions of rules of courts as well as inherent jurisdiction of the court. (See O. 2 SCR 1980; *Megat Najmuddin Bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd.*). Support for the proposition stated above can be garnered from a number of cases, and rules of procedure.

Are Rules Mandatory?

[4] It is trite that the courts' power to cure irregularities under O. 2 of the RHC 1980 and/or any other provisions of procedural law will only be exercised if the opposing party is not prejudiced. However, defects affecting the merits or jurisdiction of the court will not be cured in the exercise of discretionary power. (See *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 FC). In *Imbangan Utama Sdn. Bhd. v. Lotan Engineering Sdn. Bhd* [2002] 8 CLJ 497 it was stated

that when the court exercises its discretionary power to condone procedural irregularities it must take into account not only the issue of prejudice to the opposing party but also the interest of other parties and the interest of upholding the due administration of justice in general. In *Harkness v. Bells Asbestos and Engineering Ltd* [1967] 2 QB 729 Lord Denning observed: "The new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforth to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice."

[5] In the case of *Yu Oi Yong & Anor v. Ho Toong Peng* [1976] 1 LNS 174 Chang Ming Tat J (as His Lordship then was) commented that if rules were to bear some meaning or purpose they should be given their due importance unless the circumstances warranted otherwise. The court took the view that these rules are, in reality, nothing but the outcome of the experience of courts over the years. The court took notice that strict adherence to these rules can hinder the administration of justice. The court asserted that practitioners as well as judges must realise that while strict and lavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for any reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

[6] Legal Practitioners often say that the distinction between 'mandatory' and 'directory' rules is largely a matter of judicial taste. There are many judicial decisions which will support this proposition. For example, the courts in interpreting O. 32 r. 13(2) of the RHC 1980 have held that it is a strict requirement that any affidavit filed in support of an application must be filed and served on the other party within 14 days. (See *Malayan Banking Berhad v. Lim Tee Yong & 3 Ors* [1994] 4 CLJ 558). However, the Court of Appeal in *Perbadanan National Insurans Sdn Bhd v. Pu Lai Ong* [1996] 3 CLJ 321 did not give a mandatory interpretation to the said rule. The importance of observing procedural law is essential to attain substantive justice and early disposal of the case. However, any form of predatory instinct to use procedural law as a sword to dispose of a case without merits being heard will in truth lead to miscarriage of justice. Such a result must be avoided at all costs to ensure that the legitimate expectations of the litigant who has been embedded with the notion that the fulcrum of justice will be met by judges by ensuring that merit of the case will be heard further. The doctrine of legitimate expectation requires an adjudicator to act fairly and has become an integral part of natural justice. (See *Union of India v. Hindustan Development Corp* AIR [1994] SC 988). Many Malaysians

A cases has adopted this doctrine. (See *Ahmad Tajuddin bin Haji Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225; *Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor* [1994] 1 LNS 212).

[7] In *Government of State of Pahang v. Tengku Abdul Aziz & Anor.* [1977] 1 LNS 30 Ong Hock Sim FJ took the view that practitioners of
B justice are accepting the fact that dismissing cases on grounds of technical non-compliance does not serve justice.

[8] I have read the appeal record order submission of the parties in detail. I take the view that the appeal must be allowed. My reasons are
C as follows:

(i) The appellant has complied with the rules of procedure and the summons has been regularly issued; though the service copy was irregular because of the omission of the court registry and also the
D failure of the appellant to check the service copy before effecting service. The respondents have not been prejudiced and have appeared before the court without taking any objection. Even if objection is taken the court has discretion to condone the irregularity by ordering a fresh sealed copy to be served. In this case the appellant realizing the error has caused a fresh sealed copy to be
E issued from the registry and served it on the respondent.

(ii) In *Jumatsah bin Daud v. Voon Kin Kuet* [1980] 1 LNS 176, Chong Siew Fai J, stated that an action is commenced or instituted when the plaintiff files the writ at the registry and pays the requisite fees.
F This case is the authority for the proposition that an action is commenced when the plaintiff files the writ at the registry and pays the requisite fees and not necessarily when the writ was sealed.

(iii) In our case the appellant has complied with the rules of court and it was not a proper exercise of discretion to strike out the suit,
G when the omission was attributed to the courts registry. In such a circumstance the Federal Court in *TM Feroze Khan & Ors v. Merra Hussain b. TM Mohamed Mydin* [1999] 4 CLJ 373 had said the litigant should not be blamed. That part of the judgment reads as follows:

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> Admittedly, this application of the plaintiffs, though filed on March 13, 1993, was, for reasons unknown to us, not finally disposed of by the court till September 30, 1995. This, however, is essentially a matter in the hands of the court or the registry. There is no reason (and, indeed, none has been advanced) why
I the plaintiffs should be blamed for it.

(iv) Technical objections which does not prejudice the objector ought not prevail is a concept which has taken much importance by the recent amendments to rules of procedure and the various decision of the Federal Court insisting that courts ought to hear substantive merits. (See *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Berhad* [2002] 1 CLJ 645).

[9] For reasons stated above, the appeal is allowed with costs. The getting up fees shall not exceed RM5,000. If costs cannot be agreed the appellant is at liberty to tax the costs.